IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1594 OF 1985

Bank of India ..Plaintiffs

Vs.

B.C. Mody Exports P. Ltd

& Anr. ..Defendants.

CORAM: S.J. VAZIFDAR, J.

DATE : 13TH JULY, 2006.

Ms.Sowmya Srikrishna with Ms.Vandana Tiwari i/b.M/s.FZB & Associates for the Plaintiffs.

Ms.K.C.Nichani for the Defendants.

ORAL JUDGMENT :

This suit is filed to recover a sum of Rs.5,67,332.51/- together with interest thereon at the rate of 19.5% p.a. and to enforce the hypothecation and/or charge created by the defendants in favour of the plaintiffs to secure the repayment thereof. Defendant no.1 is the borrower. Defendant no.2 who is a director of defendant no.1 is sued as a guarantor. The hypothecation/charge

is not pressed.

The Plaintiffs' case :

2. In or about November 1974 the Plaintiff granted defendant No.1 a Demand Cash Credit facility upto a limit of Rs.2,50,000/-. In respect thereof defendant no.1 executed various documents including a Demand Promissory Note, a Deed of Hypothecation and a letter of Lien and Set off all dated 28.11.1974. The same had been tendered and marked in evidence as Exhibits P1, P2 and P3 respectively. The documents were completed in all respects when they were signed by the defendants. In March 1975 the Cash Credit facility was enhanced to Rs. 5 lacs in respect whereof a supplemental deed of hypothecation dated 29.3.1975 was executed by defendant no.1 extending the hypothecation created under the earlier deed of hypothecation to operate in respect of the increased limit. In September 1975 the Cash Credit facility was enhanced to Rs.5,50,000/- and in respect thereof another supplemental deed of hypothecation dated 4.9.1975 (Exhibit P 5) was executed by defendant no.1 extending the earlier hypothecation to cover the enhanced limit. In July 1977 certain further documents were executed including a demand

promissory note (Exhibit P 6) dated 28.7.1977 in the sum of Rs.5,50,000/- and a Continuing Security Bond dated 28.7.1977 (Exhibit P 7). The Demand Promissory Note stipulated interest at 7% p.a. over the bank rate with a minimum of 13% p.a. with quarterly rests. The continuing security bond stipulated that the promissory note was to operate as a continuing security for repayment of all monies due and payable by defendant no.1 to the plaintiffs. In consideration of the aforesaid facilities defendant no.2 executed a deed of guarantee also dated 28.7.1977 (Exhibit P 8) in his personal and individual capacity guaranteeing the repayment by defendant no.1 of the plaintiffs dues upto a limit of Rs.5,50,000/- with interest thereon.

3. Prior to the cash credit facilities initially granted in 1974 the plaintiffs had granted to defendant No.1 a "Foreign Bills Purchase" Facility (FBP facility) in 1969. Under this facility the plaintiffs were to purchase/negotiate bills of exchange drawn by defendant No.1 on various parties to whom defendant No.1 had sold goods. The Plaintiffs would thereupon credit the FBP facility account with the amount of the bills after deducting their charges.

4. The plaintiff's case, which is one of the main disputes between the parties, is that there was an agreement and/or arrangement between defendant No.1 and itself that in the event of dishonour of any of the bills of exchange purchased by it from defendant No.1 and negotiated under the FBP facility and/or in the event of the plaintiffs not receiving for any reason whatsoever the amounts of any such bills of exchange from the respective drawee and/or acceptor thereof the plaintiffs would debit the first defendant's account under the aforesaid Cash Credit facility by the amount which the plaintiffs had credited the first defendant's account in respect of the FBP facility at the time of negotiation. This agreement and/or arrangement is seriously disputed by the defendants. The arrangement is deposed to by Ved Prakash Sood on behalf of the Plaintiffs in his affidavit in lieu of examination-in-chief as under :

> " Apart from the Demand Cash Credit Facility, the plaintiffs had also granted another facility to Defendant no.1 viz. a Foreign Bills Purchase Facility in or about 1969. Under the said facility the plaintiffs would purchase/negotiate bills of exchange drawn by defendant no.1 on various parties to whom Defendant no.1 had sold goods.

> the agreement and/or arrangement between the plaintiffs and Defendant no.1 was that in the event of dishonour of any of the said Bills of Exchange, so negotiated under the said Facility and/or in the event of the plaintiff not receiving for any reason whatsoever, the amount of any of such Bills of Exchange from the respective drawees and/or Acceptors thereof the plaintiffs would debit the 1st Defendant's account under the aforesaid Cash Credit Facility with the amount with which the plaintiffs had given credit to the 1st Defendants at the time of negotiation. The arrangement was accepted and agreed by the 1st Defendants."

5. In consideration of the FBP Facility defendant no.2 and one L.B. Soman as directors of defendant no.1 executed a bill Form dated 28.11.1974 (Exhibit P-43A) the nature of which I will deal with at the appropriate place.

6. According to the plaintiffs five bills of exchange drawn by defendant no.1 on one M/s. Copal Ltd. were negotiated by it with the plaintiff under the FBP facility. The bills of exchange were in the sum of U.S. Dollars 16,356.00, 2,088.00, 2,088.00, 6, 264.00, 17,400. The said bills of exchange were accepted on 24.3.1977, 13.5.1977, 13.5.1977, 13.5.1977 and 6.6.1977 respectively for diverse

quantities of hydrochloric acid sold by defendant no.1 to M/s. Copal Ltd. The bills of exchange have not been produced in evidence.

7. In accordance with the arrangement arrived at, Defendant No.1 handed over the relevant shipping documents and bills of exchange to the plaintiffs who negotiated the same after deducting their charges. Thereupon the plaintiffs credited the account of defendant no.1 with the proceeds. Thereafter the plaintiffs sent the shipping documents to the Commercial Bank of Africa which was the collecting bank/ collection agent.

8. According to the plaintiffs the Commercial Bank of Africa was appointed by M/s. Copal Ltd. The plaintiffs gave written instructions to the Commercial Bank of Africa to hand over the original shipping documents to M/s. Copal Ltd only after they had accepted the bill of exchange. The procedure was as per the instructions of defendant no.1. According to the plaintiffs its responsibility ended upon the bills of exchange being accepted by M/s. Copal Ltd. After acceptance of the documents the bill of exchange were to be presented by the Commercial Bank of Africa to M/s.

Copal Ltd for payment 90 days after acceptance. On M/s. Copal Ltd honouring the bills of exchange the proceeds were to be sent to the plaintiffs who would adjust the same in the defendant's account. According to the plaintiffs it was the responsibility of the Commercial Bank of Africa to present the bills of exchange to M/s. Copal Ltd for payment on the due dates. As per the alleged arrangement between the plaintiffs and defendant no.1 in the event of dishonour by M/s. Copal Ltd of the bills of exchange the plaintiffs would be entitled to debit the Cash Credit Account of defendant no.1 for the amounts credited to the FBP facility account on negotiation of the dishonoured bill of exchange.

9. In respect of each of the bills of exchange defendant no.1 addressed a letter to the plaintiffs requesting the plaintiffs to negotiate the documents enclosed therewith including a bill of exchange, Invoice, Bill of Lading, GRI Form, Packing List, Form I for Bank Certificate and a Bank Guarantee Form. The letters are produced at Exhibits P 9, P 11, P 13, P 15 and P 17 respectively in respect of each of the five bills of exchange.

10. In respect of each of the bills of exchange the plaintiffs issued collection instructions to the Commercial Bank of Africa authorising them to hand over the documents against acceptance. The collection instructions are marked in evidenced as Exhibits P 10, P 12, P 14, P 16 and P 18 respectively. Upon purchase of the five bills of exchange the plaintiffs credited the first defendant's FBP facility account after deducting their charges.

11. The plaintiff's case finally is that the said bills of exchange were duly accepted by M/s. Copal Ltd and the shipping documents were thereupon handed over to M/s. Copal Ltd. The bills of exchange were however dishonoured for non-payment. The plaintiffs arranged to have the bills duly noted and protested. This case is to be found in the plaint and in paragraphs 19 to 23, of P.W.1's (V.P. Sood) affidavit in lieu of examination-in-chief. The plaintiffs have relied upon various documents in regard to the acceptance and dishonour by non-payment including certain contrary instructions issued by defendant no.1 which is a telex dated 29.3.1977 (Exhibit P 19), Notary Certificate dated 23.3.1977 notifying and protesting in respect of one

of the bills of exchange in the sum of U.S.$ 2.088.00 (the remaining certificates have not been produced in evidence though they have been referred to in the evidence of V.P. Sood). In these circumstances the plaintiffs claim that they are entitled to recover the amounts in respect of the dishonoured bills of exchange. The plaintiffs debited the Cash Credit Account as per the alleged agreement and/or arrangement referred to earlier. In support of the claim the plaintiffs have relied upon various debit invoices forwarded by them to the defendants, letters of acknowledgement of debt and security executed by the defendants and a resolution of the board of directors of defendant no.1 admitting and acknowledging the liabilities of the defendants to the plaintiff. I will refer to these documents while dealing with the issues.

12. Defendant no.1 filed Suit No. 1868 of 1980 (Exhibit "D") inter-alia to recover the amounts in respect of the said five bills of exchange.

Even after Suit No.1866 of 1980 was filed by defendant no.1, defendant no.1 executed letters of acknowledgment dated 30.11.1980 and 28.6.1982. I will deal with these letters while considering the

rival contention between the parties.

The defendants' case :

13. The defendants filed a common written statement. The defendants have admitted the request for the grant of the two facilities namely the Cash Credit facility and the FBP Facility in the years 1974 and 1969 respectively. The defendants contend that it was the plaintiffs duty to present the documents and bills of exchange to the purchaser within reasonable time and to get the same accepted and to present the bills of exchange on the due dates to the acceptor for payment. The defendants also admit that they discounted the said bills of exchange with the plaintiffs inter-alia by forwarding the documents and the bills of exchange drawn on M/s.Copal Ltd and that they had requested the plaintiffs to credit the amount of the bills to their FBP account. It is contended that the Commercial Bank of Africa is the agent of the plaintiffs for the purpose of delivery against acceptance of the bills of exchange and receiving the price thereof. According to the defendants the Commercial Bank of Africa did not present the bills of exchange to the drawee within reasonable time and

the plaintiffs also took no steps for due presentation of the bills of exchange to the drawee and thereby jeopardised the position of the first defendant.

14. The defendants contended that there was collusion between M/s. Copal Ltd, Commercial Bank of Africa and the plaintiffs as a result whereof the bills of exchange were not presented to the drawee within reasonable time from the date of the receipt of the documents nor were they presented to the drawee within reasonable time. On account of the said collusion the drawee managed to obtain delivery of the goods at the port of destination without payment. The defendant’s grievance is that they were not kept informed about non-presentation of the bills of exchange for acceptance and/or for payment. The defendants allegedly came to know about it only in September 1977 and accordingly deputed their Export Executive to visit Kenya to ascertain the facts. On 29.10.1977 the defendants instructed the Commercial Bank of Africa to get the bills protested. M/s. Copal Ltd had managed to obtain delivery of the consignments without production of the bills of lading upon their furnishing a bank guarantee to the Shipping Corporation of India, the

carrier of the goods.

15. The defendants have denied the agreement and/or arrangement pleaded by the plaintiffs as set out earlier regarding debiting the Cash Credit Account with the amount of the dishonoured bills purchased by the plaintiffs. The defendants have alleged that they signed all the documents referred to above in blank inter-alia on the representation of the plaintiffs officers that the same were required to be signed in blank and that they would not be filled in without the consent of all the parties. The defendants have alleged that when the Cash Credit facility was granted the banks norms required them to sign various documents in favour of the bank in blank. These allegations have also been made in respect of the documents as well as certain letters written on the letter heads of the defendants. In para 8 of the affidavit in lieu of examination-in-chief defendant no.2 has made the above allegations in respect of the documents including in respect of Exhibits P 2 to P 8, P 22 to P 30 and P 43 A.

16. According to the defendants the accounts relating to the cash credit facility were closed in

the year 1982 and that the transactions had not been clearly reflected in the plaintiffs books of accounts. The defendants have disputed the accounts. The defendants have denied that the bills of exchange were presented for acceptance. The defendants have denied that the plaintiffs sent any debit invoices.

17. By an order dated 29.6.2005 S.U. Kamdar, J (as His Lordship then was) settled the following issues :-

1. Whether the plaintiff has advanced foreign bill purchase facility to the defendant and thereunder a sum of Rs.3,57,363.58/- is payable alongwith interest at the rate of 19.5% p.a. ?

2. Whether the plaintiff proves that the plaintiff were entitled to debit the cash credit account with the amount covered by the five bill of exchange purchased by the plaintiff and dishonoured by the drawee M/s.Copal Ltd. ?

3. Whether the plaintiff proves that the bill of

exchange were dishonoured on the ground of non-payment ?

4. Whether the defendant proves that the plaintiff were negligent in not ensuring proper presentation of the bill of exchange and thus they are not liable to make payment in respect of the said five bills of exchange ?

5. Whether the defendant proves that the Commercial Bank of Africa was the agent of the plaintiff and thus on the defaults on the part of Commercial Bank of Africa the plaintiffs are liable ?

6. Whether the defendant proves that the defendant no.1 executed the documents in blank and as such the same are not binding on the defendants ?

7. Whether the defendant no.2 proves that the deed of guarantee executed by him was without consideration ?

8. Whether the plaintiff proves that the

defendant has accepted and or confirmed the liability under the cash credit account by signing the letter of acknowledgement as set out in the plaint ?

9. Whether the defendant proves that there was a collusion between the plaintiff Commercial Bank of Africa and M/s. Copal Ltd. and by virtue of such collusion the liability of the defendants in respect of the suit transaction is discharged ?

10. Reliefs, if any ?

18. Evidence of all the witnesses was led before the Commissioner for taking evidence. The plaintiffs led the evidence of one V.P. Sood and one Suhas Eknath Kulkarni. Defendant no.2 examined himself on behalf of defendant no.1 and himself.

Re : ISSUE NO.6

Whether the defendant proves that the defendant no.1 executed the documents in blank and as such the same are not binding on the defendants ?

19. In paragraph 8 of his examination-in-chief, Defendant No.2 deposed that the various documents referred to and relied upon by the Plaintiff were executed by/on behalf of the Defendants in blank. He further alleged that he had handed over several blank letter heads of Defendant No.1 which were subsequently filled-in by the Plaintiffs. While mentioning certain specific documents, he has alleged that they constituted only some of the documents which were given in blank. In other words, according to the Defendants, all the documents, agreements, deeds, writings and letters in the case were executed by or on behalf of the Defendants in blank.

20. The evidence suggests the contrary. Indeed, in respect of certain crucial documents, Defendant No.2 admitted in cross-examination that they were not executed in blank.

21. Firstly, it is pertinent to note that the reasons for, and the circumstances in which the documents were allegedly executed in blank on behalf of the Defendants have not been proved. Defendant No.2 alleged that the various documents were executed in blank as the Plaintiff required them to

do so. He stated in paragraph 8 of his evidence that, ".....one of the bank official who was dealing with me in respect of the said cash credit facilities had assured me that the said documents are required to be signed in blank.....". He does not mention who the bank official was. He did not mention the name of the bank official in his written statement. He did not mention his name in the evidence.

Later, in paragraph 8, he once again deposed : "The said bank official also asked me to hand over certain blank letter heads duly signed by me in my capacity as a director of the first Defendant". Once again, he does not mention the name of the bank official.

He further went on to state : "I was reluctant to do so but the said bank official assured me that the same will not be tampered with or filled in without my consent and without my knowledge. He insisted that forwarding of the said documents was essential before the bank agrees to grant cash credit facilities." Here again, he does not mention the name of the bank official.

22. On a question such as this, it was incumbent upon the Defendant to name the bank official. The Defendants ought at least to have indicated some facts by which the name of the bank official could have been ascertained. Such alleged assurances even if given, would be beyond the normal authority of the Plaintiff's officers. The assurances would not be binding on the Plaintiff in the absence of anything more. The Defendant has not indicated any circumstances which would suggest that the alleged assurances, even if given, were binding on the Plaintiff.

23. Secondly, four documents, which are of crucial importance in the case inasmuch as they constitute an acknowledgment of the Defendant's liability are at Exhibit "P-27", "P-28", "P-29" and "P-30" in evidence. Before I describe these documents, it is important to note that in paragraph 8 of the examination-in-chief, Defendant No.2 specifically, and not merely generally, referred to them as having been signed in blank. It is further important to note that Defendant No.2 in paragraph 26 in his examination-in-chief stated as under :

"26. In the various Exhibits

> which are printed blanks have been subsequently filled in by the Plaintiff's officers. Exhibits P-27, P-28 and P-29 were furnished by the Defendants to the Plaintiffs which were completely blank and the Defendant No.1 has merely signed on the documents without the documents being either typed out or filled in".

24. The attention of Defendant No.2 was specifically drawn to Exhibits P-27 to P-30. The second Defendants' answers to Questions 27 and 28 are of crucial importance. They read as under :

> "[Attention of the Witness is drawn to Exhibits 'P27', 'P28', 'P29' and 'P30' of the Compilation of Documents]
>
> Q.27 Please show me where are the blanks in the documents which have been filled in by hand ?
>
> Ans. As far as these documents, being Exhibits 'P27', 'P28', 'P29' and 'P30' are concerned, there is nothing in the said documents that the Plaintiffs have filled in any blanks.
>
> Q.28. I put it to you that the documents at Exhibits 'P27', 'P28', 'P29' and 'P30' did not contain any blanks and that you have signed the same and handed them over to the Plaintiffs with the full knowledge and understanding of the

contents thereof.

Ans. The fact that I had signed these documents automatically concludes that I had understood the documents and contents thereof."

25. It must be noted that there was no re-examination on this issue. The question whether these documents were executed in blank or not, must therefore be conclusively answered in the negative, against the Defendants.

26. Thirdly the 2nd Defendant answers to Question Nos.11 to 17 in his cross-examination are relevant and read as under :

"Q.11 Where would you normally keep letter-heads of Defendant No.1 Company ?

Ans. The said letter-heads were kept in the office with the concerned persons generally.

Q.12 Have you ever handed over blank signed letter-head/s to strangers ?

Ans. Never

Q.13 Therefore, would it be correct to say that under normal circumstances you would not hand over signed blank letter-head/s of

Defendant No.1 to any stanger ?

Ans. Except to the banker (Witness volunteers) Whenever the same is asked for and with the understanding that the same will not be used without my consent.

Q.14. As a commercial person, are you aware of the procedure followed by the Banks while granting credit facilities to the customers ?

Ans. I am not aware about the bank procedures.

Q.15. Apart from dealing with the Plaintiff-Bank, did you ever availed any credit facilities from any other bank/s ?

Ans. Yes.

Q.16 At that time, did you hand over to that bank blank letter-heads of Defendant No.1 Company signed by you?

(At this stage Ms.K.C. Nichani objects saying that it is not relevant question as to how many banks the Witness has dealt with and in what manner and the same is not the issue in the present matter that the Witness is dealing with any third party/bankers)

(Ms.Sowmya Srikrishna replies saying that the question is relevant to show whether the Defendants were in the practice of handing over blank signed

letter-heads as that is the defence raised by the Defendants in the present suit).

Ans. I do not remember.

Q.17. You had filed suit being Suit No.1866 of 1980 against the Plaintiffs. Please look at the Plaint (Exhibit-D3). Is there any allegations in the said Plaint that the Plaintiffs herein requested you to hand over blank signed letter-heads to them ?

Ans. It is not mentioned in the said Plaint."

27. The objection to Question No.16 is overruled. The question is relevant as regards the Defendant's allegation about the practice of signing blank documents. Defendant No.2 has alleged that he had signed the suit documents in blank. An enquiry as to his practice in other matters especially regarding bank transactions is relevant.

28. The above answers do not inspire much confidence in regard to his case of having signed blank documents in this case. There is no convincing reason why the Defendants executed blank documents only in the present case. While volunteering the answer to Question No.13, Defendant

No.2 does not even state when the alleged "understanding" was arrived at. Nor does he state with whom the "understanding" was arrived at.

29. Fourthly even in Suit No.1866 of 1985 filed by the Defendants against the Plaintiffs (Exhibit "D-3") there is no allegation regarding the Defendant having handed over blank letter heads to the Plaintiff.

30. Further, it is important to note that Exhibits "P-27" to "P-30" which, as we have already seen, were admittedly duly executed, referred to many of the documents which Ms.Nichani submitted were executed in blank. The fact that such documents were referred to in the letters of acknowledgment which are now admitted, belies the Defendant’s case on this issue.

31. It would be convenient at this stage to refer to the contents of these documents.

Exhibit "P-27" is a letter of acknowledgment of debt, dated 5.3.1976 executed by Defendant No.2 on behalf of Defendant No.1. The letter acknowledges the grant of the Cash Credit facility

and the execution of the documents in connection therewith which have been referred to earlier. The letter further expressly acknowledges that there was due and payable to the Plaintiffs by the Defendants as on 12th December, 1975, a sum of Rs.5,09,219.33 plus interest from 1.10.1975 and that the same was secured by a demand promissory note, letters of continuing security, joint letter of guarantee signed by Defendant No.2, one A.V. Mody, one J.P. George and one L.B.Soman, agreement of hypothecation, stamped undertaking to retain a minimum balance of Rs.3,00,000/- out of the loan given to Defendant No.1 till the losses are wiped out and an undertaking of one M/s.K.M.Parekh & Co., stating that there was no lien on the stocks lying with them and a letter of lien. The letter further confirms that the documents were in full force and effect. It also confirms that in consideration of the Plaintiff continuing the Cash Credit Account, the Defendants agreed to interest at the increased rate of 7% per annum with a minimum of 16% per annum with quarterly rests and for a continuation of securities.

32. Exhibit "P-28" is a similar letter of acknowledgment of debt dated 27.7.1978. The

acknowledgment here was in the sum of Rs.8,14,175.64. There was a temporary over draft facility in respect of the CC Account to the extent of Rs.3,50,000/- over the sanctioned limit. The same was however brought down subsequently.

33. Exhibit "P-29" is yet another letter of acknowledgment of debt dated 13.11.1980. The acknowledgment was in the sum of Rs.5,93,034.37.

34. Finally, there is a letter of acknowledgment dated 28.6.1982 (Exhibit P-30). The acknowledgment of debt herein was in the sum of Rs.3,93,078.16. I may only mention here that each of these letters of acknowledgment refers to the documents executed from time to time in respect of the enhanced facilities. The nature of the documents are similar and it is not necessary to set out the details of each of them.

35. The suit was filed on 27.6.1985. Exhibit "P-30" i.e. the letter of acknowledgment dated 28.6.1982 assumes greater importance when read with Exhibit "P-32", which is a certified copy of an extract from the minutes of the meeting of the Board of Directors of Defendant No.1 held on 28.6.1982.

This is an admitted document. It is pursuant to this resolution that Exhibit "P-30" was executed. The minutes of the meeting indicate that the Board of Directors mentioned the details of the facilities and passed the following as resolution No.2 :

> "2) That the company do confirm and acknowledge the debit balance in the account, the documents executed and the security created in favour of the Bank, in terms of Form L:444/D sent by the Bank, and that in token of such confirmation and acknowledgement the Common Seal of the company be affixed on the said Form L:444/D in the presence of and the same may be signed on behalf of the company by Mr.B.C.Mody the Director of the company."

36. I do not find any force in Ms.Nichani’s submission on this issue even in respect of the other documents. She submitted that there was intrinsic evidence to indicate that Exhibit "P-1" was executed in blank. Exhibit "P-1" is the promissory note dated 28.11.1974 in the sum of Rs.2,50,000/-. She based her contention on the fact that it mentions the names of four persons as promisors whereas only Defendant No.2 executed the promissory note.

No question was put in this regard to the Plaintiff's witnesses in cross-examination. Secondly, admittedly, at that time, the aforesaid four persons including Defendant No.2 were named as guarantors. The mere fact, therefore that the other three did not sign the promissory note, would not indicate that the document was signed in blank.

The intrinsic evidence in fact indicates that not only was the document not signed in blank but that the Defendants affirmed and ratified the contents thereof throughout. There is no dispute that the loan was in fact in the sum of Rs.2,50,000/- when the promissory note was executed. Nor is there any dispute that the correct date of execution of the promissory note was 28.11.1974. The intrinsic evidence therefore establishes the promissory note.

37. Ms.Nichani then referred to Exhibit "P-2" which is the deed of hypothecation dated 28.11.1974. The handwritten portions have been counter-signed in the margin. That clause 3 which was deleted did not contain the initials in the margin, is of no consequence. It referred to the rate of interest which was, in fact, not filled-in. The clause,

whether it was cancelled or not, was therefore of no consequence. The rate of interest was specified in clause 4 which contains initials on the side. Ms.Nichani however submitted that clause 2 purports to hypothecate in favour of the Plaintiff even goods the Defendants did not deal in. However, admittedly, it refers to goods the Defendants dealt in at that time, such as diesel engine parts, chemicals, fish hooks and polyamide resin. The mere fact that certain other goods were also mentioned would not establish that the document was executed in blank.

38. That the blanks were filled in, in the same handwriting is not conclusive or even indicative of the documents having been signed in blank.

39. In this view of the matter it is not necessary to deal with the judgements cited by Mrs.Srikrishna in the case of *Saunders vs. Anglia Building Society 1971 AC 1004 and United Dominious Trust Ltd. vs. Western B.S. Romanay (1976) 1 QB 513.*

40. Issue No.6 is therefore answered in the negative.

Re : ISSUE NO.7

Whether the defendant no.2 proves that the deed of guarantee executed by him was without consideration ?

41. The deed of guarantee which is dated 28.7.1977 is Exhibit "P-8". Ms.Nichani agreed that the answer to this issue will depend upon the answer to Issue No.6 for, as she clarified, this contention was based solely on the ground that the guarantee had been signed in blank.

42. Issue No.7 is therefore answered in the negative.

Re : ISSUE NO.2

Whether the plaintiff proves that the plaintiff were entitled to debit the cash credit account with the amount covered by the five bill of exchange purchased by the plaintiff and dishonoured by the drawee M/s.Copal Rice Ltd. ?

43. In support of the case on this issue, the Plaintiffs sought to tender two letters dated

22.6.1978 and 20.7.1978. The letters having been objected to, were marked 'X1' and 'Y1' for identification. If the letters are proved there is no doubt that the agreement pleaded by the Plaintiff would stand established. Ms.Nichani did not dispute the same either. The first question therefore is whether these letters ought to be admitted in evidence.

44. The letters were not produced initially. On 14.12.2005 the Plaintiffs took out Chamber Summons No.1547 of 2005, praying that the two letters be taken on record and admitted in evidence. The originals of these two letters were produced. Prior thereto, the Plaintiffs sought to tender copies of these two letters and to lead secondary evidence in respect inter-alia to these two letters. The affidavit in support of Chamber Summons No.1547 of 2005 states that subsequently after carrying out a further search the Plaintiffs located the originals. It is in these circumstances that the Chamber Summons was filed.

45. In paragraph 6 of the affidavit in support of the Chamber Summons, the Plaintiffs expressly stated that the letters have been issued by the Defendants

to the Plaintiffs. No reply controverting the issuance of the letter was filed. By an order dated 20.12.2005 it was held that the Plaintiffs would have to prove the documents by leading evidence.

46. Thereafter, the Plaintiff filed the affidavit in examination-in-chief of one Suhas Eknath Kulkarni, to prove the documents. Apart from stating the aforesaid facts regarding the manner and circumstances in which the documents were found from the record of the company, the witness expressly stated that the letters were signed by Defendant No.1. The Defendants objected before the learned Commissioner to the documents being taken on record. The learned Commissioner therefore marked the documents ‘Y1’ and ‘Y2’ for identification.

47. Firstly, it must be noticed that no grounds of objection were stipulated by the Defendant’s counsel. An objection was taken simplicitor. The Commissioner naturally, having no power to decide the admissibility of documents, merely marked the documents for identification.

Even before the Commissioner for taking evidence, it is desirable for a party objecting to evidence, oral

or documentary, being taken on record to specify the grounds of objection. For it is on these grounds that the Court can finally decide the question of admissibility. Where evidence is recorded by a Court the objection is considered and ruled on whether immediately or as is now permissible in view of the judgement of the Supreme Court in the case of *Bipin Shantilal Panchal v. State of Gujarat*, *AIR 2001 SC 1158* at the hearing. In either case the party tendering the evidence is then put on notice and may either challenge the ruling if the evidence is rejected or seek to prove it in another manner or through another witness. In the latter case it would save time and expense for all the parties as it may obviate a possible order of remand. The recording of the grounds of objection before a commissioner would serve the same purpose and in fact to a greater extent.

In addition thereto, is the fact that the execution of these letters was never denied either n reply to the affidavit in support of Chamber Summons No.1547 of 2005 or while taking the objection. Even in the cross-examination, it was not put to the Plaintiff’s witness that the documents had not been signed by or on behalf of the Plaintiffs.

48. Thus, the documents must be admitted in evidence. The letters dated 22.6.1978 and 20.7.1978 are therefore taken on record and marked in evidence as Exhibits "P-44" and "P-45" respectively.

49. As rightly contended by Mrs.Srikrishna, these documents establish the Plaintiff’s case regarding the above arrangement.

(a). By the letter dated 22.6.1978 (Exhibit "P-44") the Defendants inter-alia stated as under :

> "Since the above bills are not paid, we request you to debit our C/C account and release our liabilities."

The Defendants also requested the Plaintiffs to credit their FBP Account with the margin money.

(b). Similarly, by the letter dated 20.7.1978 (Exhibit "P-45") the Defendants stated as under :

> "Since the above bill is not paid, we request you to debit our C/C account to release our liabilities".

50. Ms.Nichani submitted that the fact that the oral agreement was never referred to in the correspondence, militates against the existence thereof. The submission is without any force. It is important to note that in the letters of acknowledgment, the Defendants have expressly admitted their liability under the CC Account. The acknowledgement of necessity refers to only one figure, the final consolidated figure. The acknowledgement thereof however involves a consideration of the entire account - all the entries. It is a reasonable and justifiable presumption that people, are aware of the correct state of their accounts and that they acknowledge the balance due thereunder after considering their account and examining the entries therein. I do not suggest the presumption to be irrebutable. But in the absence of anything to the contrary it must operate. To hold otherwise would denude such acknowledgements of their commercial efficiency. The presumption is stronger when the acknowledgement is by men of business and when made in respect of commercial transactions.

51. The CC Account was debited with the rupee equivalent of the dishonoured bills of exchange. If

there was no such agreement, surely the Defendants would not have acknowledged their liability under the CC Account to the extent, it included entries of the value of the dishonoured bills of exchange. That they did so without qualification implies that they were aware of the fact that the Cash Credit Account included debits to the extent of the value of the dishonoured bills of exchange. It would then be an irresistible conclusion that there was an agreement as pleaded by the Plaintiffs, entitling them to do so.

52. There is one additional factor which though not conclusive by itself, is of considerable importance when viewed with the above facts. Exhibit "P-31" is the letter dated 10.7.1980 addressed by the Defendants to the Plaintiffs. In paragraph 2, the Defendants have stated :

> "All along, we have been requesting your bank that they should take necessary action, more so, <u>when we have refunded the amounts advanced by you</u>."

In paragraph 5, the Defendants have once again stated that they refunded the moneys to the Plaintiff. Admittedly, the amounts had not been

refunded. The second Defendant's answers to Questions Nos.42 to 45 are important, and read as under :

"Q.42. In Exhibit-P31, at paragraphs 2 and 5 thereof you have stated that you have refunded the bill amount to the Plaintiffs. Please explain what is meant by this statement ?

Ans. I never refunded the amount and that is why suit No.1866 of 1980 was filed by us.

Q.43. Would it be correct to say that your statement made in the letter at Exhibit-P31 of which you have admitted the contents in your Affidavit of Evidence that you have refunded the amounts to the Plaintiffs is false ?

Ans. The statement made by me in paragraph 12 of my Affidavit is correct.

Q.44. I put it to you that the refund mentioned in Exhibit-P31 was made by way of debit entries to your Cash Credit Account for amounts due under your Foreign Bill Purchase Account.

Ans. It is not correct.

Q.45. I put it to you that by repeatedly stating in Exhibit-P31 that you have refunded the bill amounts, you have, in fact,

admitted, accepted and acted upon the arrangement between the Plaintiffs and the Defendants of debiting your Cash Credit Account for amounts due under your Foreign Bill Purchase Account ?

Ans. It is not correct.

53. The statements in Exhibit "P-31" regarding refund were not inadvertently made. They were made consciously. The statement in paragraph 2 was reiterated in paragraph 5. There is no explanation from the Plaintiff regarding the same. There is no explanation as to what the Defendant meant by stating that they have refunded the amounts. This fact, specially when seen in conjunction in Exhibits "P-44" and "P-45" justify the suggestion put to the Plaintiff in Question No.45. The only logical inference is that the Defendants considered the amounts of the dishonoured bills of exchange as having been paid in view of the transfer thereof in the Cash Credit Account.

54. It would be convenient to deal with another aspect of the matter here, though it is also relevant to the subsequent issues. Ms.Nichani invited my attention to an endorsement in three

Exhibits viz. Exhibit "P-12", "P-16" and "P-18" dated 1.4.1977, 1.4.1977 and 11.4.1977 respectively. These Exhibits are the Plaintiff's collection instructions to the Commercial Bank of Africa. They contained instructions by the Plaintiffs to the Commercial Bank of Africa. The details of each of the said bills of exchange are mentioned therein. These collection instructions are in respect of three of the said five bills of exchange. Ms.Nichani relied upon identical hand written endorsements in rectangular boxes across the face of each of the collection instructions, which read as under :-

> "Refund obtained on 26/6/78 EBP Nil."

55. Ms.Nichani submitted that in view of this endorsement, it is clear that the Plaintiffs had obtained a refund in respect of the relative bills of exchange. The argument is without any force.

56(a). The plaint in Suit No.1866 of 1980 filed by the Defendants in this Court together with the annexures thereto was Exhibited as Exhibit "D" in evidence in the present matter. In paragraph 15 of

the plaint in Suit No.1866 of 1980 the Defendants have stated as under :

> "However, the 1st Defendants wrongfully debited the Plaintiffs' Cash Credit Account with the amounts of the said 7 Bills of Exchange and interest and sent on 22nd June, 1978, 25th July, 1978 advice notes of having debited to the Plaintiff's said account sums of Rs.1,23,864.43, Rs.1,65,939.33 and Rs.1,43,588.63. Copies of the said Debit Advices are hereto annexed and marked EXHIBIT 'G'."

(b). Thus, admittedly the debit advice notes were forwarded by the Plaintiffs to the Defendants. The contents thereof, are important while deciding the question about the agreement alleged by the Plaintiff and the refund alleged by the Defendants. The debit advices include the debits in respect of all five of the aforesaid bills of exchange. The rupee equivalent of the amount of the said bills of exchange were specified and, in respect thereof, the following was expressly stated by the Plaintiffs :

> "Bank of India present their complements and beg to inform you that your cash credit account has been debited as under"

(c). Surely, if such an arrangement had not been

agreed upon, the Plaintiffs would have objected immediately upon receipt of the debit advices. They never questioned the right or authority of the Plaintiffs to so debit their CC account.

(d). Thus, the doubt, if any, as to the arrangement pleaded by the Plaintiff and the fact of the debit of the amounts of the dishonoured bills of exchange in the cash credit account, is now established beyond any doubt.

57. In this view of the matter it is not necessary to consider Mrs.Srikrishna's further submission based on clause 2 of Exhibit "P-3". (letter of lien and set-off dated 28.11.1974.) Nor is it necessary therefore to deal with two judgements cited by Mrs.Srikrishna in the case of *Devendrakumar Lalchandji vs. Gulabsingh Nekhesingh, AIR (33) 1946 Nagpur 114* and *N. Mohamed Hussain Sahib vs. Chartered Bank, Madras, AIR 1965 Madras, 266.*

Re : ISSUE NO.3

Whether the plaintiff proves that the bills of exchange were dishonoured on the ground of non-payment ?

58. Ms.Nichani relied upon Exhibit "P-43B", a copy of noting and protesting certificate, pertaining to one of the said bills of exchange dated 23.3.1977. The certificate does not state that the bill of exchange had been accepted. On this basis, she submitted that the bills of exchange were not accepted. She further submitted that the bills of exchange were not even produced in evidence and, therefore, acceptance was not even proved.

59. The argument is without force. That the bills of exchange were accepted is admitted by the Defendants themselves. In paragraph 8 of the plaint in Suit No.1866 of 1980 (Exhibit "D" in evidence in this suit), the Defendants have expressly stated that they had been informed about the fact that the bills of exchange were presented to M/s.Copal Ltd. for acceptance and that upon such acceptance, all the shipping documents were handed over by Commercial Bank of Africa to Copal Ltd. In Exhibit "C" to the plaint in Suit No.1866 of 1980 the Defendants have themselves given the particulars of the five bills of exchange including the dates of acceptance thereof by the drawee viz. M/s.Copal Limited.

60. It is not open therefore for the Defendants to contend to the contrary. The issue therefore is answered in the affirmative and in favour of the Plaintiff.

61. That the bills of exchange were dishonoured by non-payment by the acceptor is admitted. The only question is whether the Defendants refunded the same to the Plaintiffs. This aspect has been considered while dealing with issue no.3. In fact the Defendants themselves do not allege to have paid the same at all. The submission regarding the alleged refund was based solely on the endorsement in Exhibits P-12, P-16 and P-18. I have already explained the purpose of this endorsement. It is based on the debit in the CC account of the amount of the dishonoured bills initially created to the FBP account on purchase of the bills. There is no other explanation for the same.

62. Issue No.3 is therefore answered in the affirmative.

Re : <u>ISSUE NO.4</u>

Whether the defendant proves that the plaintiff were negligent in not ensuring proper presentation of the bill of exchange and thus they are not liable to make payment in respect of the said five bills of exchange ?

63. Ms.Nichani submitted that even assuming that the bills of exchange were accepted, they were not presented in time and the notice of dishonour was not given to the Defendants in time.

64. Even assuming that the Defendants have established these contentions, it would not carry their case any further and they will not be entitled to resist the Plaintiff’s claim on these grounds. Exhibit "P-43A" is the original Bill Form No.1005 dated 20.11.1974, the relevant portion whereof reads as under :

> "1. You may at your option but at my/our risk and responsibility in all respects, appoint an agent, who shall be my/our agent to collect.
>
> 2. You or the agent, at your or his option, may send for collection or payment on my/our account at my/our entire risk and responsibility by post or by other

> manner to another agent or to the drawee thereof any cheques, bills, hundis or other instruments with or without share certificates or other documents attached I/We agree that such other agent or the drawee shall be my/our agent for collection at my/our entire risk and responsibility in all respects."

In view of this contractual stipulation, it would not be open to the Defendants to foist any liability upon the Plaintiffs even assuming that there was any negligence on the part of the Commercial Bank of Africa as alleged.

65. It is not necessary therefore to consider Mrs.Srikrishna's submission based on Section 30 read with Section 98(g) of the Negotiable Instruments Act.

66. Issue No.4 is therefore answered in the negative and against the Defendants.

Re : ISSUE NO.5

Whether the defendant proves that the Commercial Bank of Africa was the agent of the plaintiff and thus on the defaults on the

part of Commercial Bank of Africa the plaintiffs are liable ?

67. In view of the above discussion on Exhibit "P-43A", Issue No.5 is answered in the negative and, against the Defendants.

Re : ISSUE NO.9

Whether the defendant proves that there was (a) collusion between the plaintiff Commercial Bank of Africa and M/s. Copal Ltd. and by virtue of such collusion the liability of the defendants in respect of the suit transaction is discharged ?

68. Ms.Nichani was unable to indicate any evidence which established any collusion on the part of the Plaintiffs. In fact, it never was seriously contended by the Defendants that there was any collusion on the part of the Plaintiffs. The Defendant’s case was one of collusion between the drawee and the Commercial Bank of Africa. This is clear inter-alia from paragraph 6 of the letter dated 10.7.1980 (Exhibit "P-31") which reads as under :

> "6. Even we have enough proof from Shipping Corporation of India that the bank guarantees given by the Commercial Bank of Africa Ltd. for bills of lading, which they were holding as your agents and property, have been cancelled after the bills were protested for non-payment and this itself proves that the Commercial Bank of Africa Ltd. has acted in collusion with the drawee, Copal Ltd., Nakuru. It has been our considered opinion that the collecting bank, i.e. Commercial Bank of Africa Ltd., had no right to cancel the bank guarantees by misusing the existing bills of lading in their possession when the buyers had taken away the goods, without obtaining confirmation from you. This step could never have been taken by the Commercial Bank of Africa Ltd. if the officials in your bank had shown/taken due care of our bills and ascertained the fate of the documents and reporting the same to us in time in which event we would have also taken steps to protect our/your interest either through you or through our lawyers."

69. Issue no.9 is therefore answered in the negative.

Re : <u>ISSUE NO.8</u>

<u>Whether the plaintiff proves that the defendant has accepted and/or confirmed the liability under the cash credit account by signing the letter of acknowledgement as set</u>

out in the plaint ?

70. In view of the finding regarding Issue No.6, Issue No.8 is answered in the affirmative, in favour of the Plaintiff.

Re : ISSUE NO.1

Whether the plaintiff has advanced foreign bill purchase facility to the defendant and thereunder a sum of Rs.3,57,363.58/- is payable alongwith interest at the rate of 19.5% p.a. ?

71. The first part of the issue does not really arise as the Plaintiff has admittedly granted the foreign bill purchase facility to the Defendant. The only question is whether the said sum is payable, as claimed in the plaint. Ms.Nichani's submission in this regard was that the Plaintiffs having failed to produce the accounts in respect of the CC facility and the FBP facility, have failed to establish the claim in suit. In fact, she urged this submission also in support of her case that the Plaintiffs had not established the alleged agreement.

72. At the outset, I must mention that Mrs.Srikrishna sought to tender the account in respect of the CC facility, at the hearing of this suit. She stated that the accounts had been sought to be tendered both in this Court in the aforesaid Chamber Summons as well as before the Commissioner. I did not permit her to do so as the evidence had already been closed.

73. It is true that the accounts have not been proved in evidence. Without anything more, the Plaintiffs would not have been entitled to succeed in the suit. Indeed, in the absence of anything else, the Defendants would have, with considerable force, been justified in contending that an adverse inference ought to be drawn against the Plaintiffs as a result of their having failed to prove the accounts. This, would have been on the basis that had the accounts been produced, the same would have established that the value of the dishonoured bills had not in fact been debited to the CC account. Consequently, the Plaintiff’s case of the alleged arrangement would have been held not to have been proved.

74. However, in the facts and circumstances of the present case, such an adverse inference is not warranted. As stated earlier, Exhibits "P-44" and "P-45" viz. the letters dated 22.6.1978 and 20.7.1978 establish the arrangement. Further, the Plaintiffs have clearly established by virtue of the debit advices forwarded by them to the Defendants (Exhibits "C" to "D") that the Plaintiff had, in fact, so debited the CC Account. There is no explanation whatsoever from the Defendants in this regard. Nor is there any answer from the Respondents in regard to the other circumstances that I have already indicated in this regard.

75. Faced with this situation, Ms.Nichani stated that even the amount at the foot of the account has not been stated by virtue of the non production of the accounts. This argument is of no assistance to the Defendants in the present case as they have admitted their liability in Exhibit "P-27" to Exhibit "P-32". Though initially the Defendants had alleged that these acknowledgments are of no effect having been signed in blank, they admitted in cross-examination that they were not signed in blank. There was no re-examination on the point either. There is nothing to suggest that the figure

mentioned by the Defendants themselves were incorrect. Nor have the Defendants contended that after the last acknowledgment they made any payment.

76. Ms.Nichani submitted that the suit was filed to recover the amounts due in respect of the cash credit account and not on the said five bills of exchange. The amount claimed however indicates the value of the dishonoured bills of exchange and the suit is therefore not maintainable.

77. There is no dispute that the cause of action in the suit is not based on the dishonoured bills of exchange. The suit is filed to recover the amounts due in the CC account. The CC account however ceased to pertain exclusively to the transactions relating to the demand CC facility. This was in view of the said arrangement considered while dealing with issue No.3. The CC account, in view of the arrangement, included entries relating to the dishonoured bills of exchange. Ms.Nichani's submission is therefore not well founded.

78. In the circumstances, issue No.1 is answered against the Defendants and in favour of the Plaintiffs.

Re : ISSUE NO.10

Reliefs, if any ?

79. In the circumstances, the suit is decreed in terms of prayers (a) and (g).